

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To Be Argued By
Thomas McGanney

77-1296

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALPHONSE BIFULCO,

Defendant-Appellant.

Docket No:
77-1296

On Appeal From A Judgment of The
United States District Court For
The Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT BIFULCO



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : DOCKET NO. 77-1296
77-1297

-against- :

ALPHONSE BIFULCO, :

Defendant-Appellant. :

- - - - - x

Brief for Appellant
Alphonse Bifulco

On Appeal From A
Judgment of The United
States District Court for
The Eastern District of New York

Preliminary Statement

Appellant Alphonse Bifulco appeals from a judgment of conviction entered, after a jury trial, on March 30, 1977.

In an indictment filed December 29, 1976, appellant was charged with violation of 21 U.S.C. §§841(a)(1) and 846. Specifically, appellant was accused of knowingly and intentionally combining and conspiring with four other defendants and four co-conspirators to (1) manufacture substantial quantities of Phencyclidine (hereinafter sometimes referred to as "PCP", "angel dust" or "dust"), a Schedule III controlled

substance; (2) distribute and possess with intent to distribute substantial quantities of PCP; and (3) conceal the existence of the conspiracy. No substantive violations of law were charged.

Trial of four of the defendants before a jury and the Honorable Mark A. Constantino, U.S.D.J., was commenced on March 14, 1977; and on March 30, 1977 the jury returned a verdict of guilty against appellant and two of the other defendants and acquitted the third defendant.* On June 3, 1977, appellant was sentenced to four years in jail, a special parole term of five years and a fine of \$1,000. He is presently incarcerated.

Issues Presented for Review

1. Should the conviction of Appellant Alphonse Bifulco be reversed because the proof adduced at trial established multiple conspiracies and not the single conspiracy alleged in the indictment?

2. Was there sufficient evidence to support a finding beyond a reasonable doubt that appellant knowingly and willfully participated in a conspiracy to manufacture PCP?

*Defendants Jack McFarland and Michael Thistlethwaite were found guilty; defendant Mario Bifulco, appellant's brother, was acquitted.

STATUTES INVOLVED

1. 21 U.S.C. §841(a)(1):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

2. 21 U.S.C. §846:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Statement of the Facts

The Appellant, Alphonse Bifulco, and four other defendants were named, along with four alleged non-defendant co-conspirators, in an indictment charging violations of Federal Narcotics Laws. In support of the indictment the Government sought to establish the existence of a single conspiracy, the object of which was the manufacture, distribution, and possession with intent to distribute, substantial quantities of PCP, a Schedule III controlled substance. The conspiracy was alleged to have existed from June, 1975 through December 29, 1976, the date of the filing of the indictment.

A. The Trial - The Government's Case

The trial lasted approximately three weeks and covered

approximately 1700 pages of transcript. The prosecution called thirteen witnesses and the defense one.

The Government's proof essentially focused on the testimony of two individuals who described their own activities in connection with one or more of the defendants on trial. The first witness, Larry DeMaio, an individual with a history of drug addiction and abuse (385,458,460), testified that he first made PCP in 1973 with individuals not named in this indictment (386). He further testified that he smoked PCP and sold it to his friends (388). He then described the steps in making PCP (390).^{*} He then testified that in the summer of 1975, he met Stephen Kopf (named as a co-conspirator in the indictment but not a defendant) and that through Kopf he met defendants John McFarland and Michael Thistlethwaite in August, 1975 (391,392w).

DeMaio then testified that in August, 1975 he had a meeting with Thistlethwaite and McFarland during which the details of an arrangement to manufacture PCP were discussed. These arrangements were: DeMaio would make 10 pounds of PCP a week and receive \$400 per pound; McFarland would supply the chemicals to make PCP, the place to make PCP, and would bear responsibility for distributing the PCP (394,396). Approximately a week later, DeMaio met with McFarland, Thistlethwaite and McFarland's girlfriend during which he was supposedly told by McFarland "that everything was proceeding

^{*}"You take four chemicals, cyclohexioanone, sodium cynide (sic), sodium bisulfate, and piperidine and you mix them together and it forms a crystal. And that crystal you save. Then you take bromozenzene, magnesium turnings, and ethyl ether and that forms a chemical known as Grignard. You mix the two of them together, the crystals and the Grignard, and get PCP crystal - angel dust." (390)

o.k. He didn't have any chemicals yet but things were working out." (396) In addition, Thistlethwaite, according to DeMaio, said he would be working with DeMaio in the making of PCP (396,397).

DeMaio then testified that on two separate occasions (end of September, 1975 and middle of October, 1975) he traveled upstate with Thistlethwaite and McFarland to make Grignard; both expeditions were failures because the chemicals didn't react as expected (404,405). His next attempt, toward the end of October, 1975, was successful; this was followed by one more successful effort in November, 1975 (406, 407). For his efforts, DeMaio testified that he received approximately \$250.00 (409). Shortly after his second successful making of PCP, DeMaio stated that he advised McFarland and Thistlethwaite that he was not going to make PCP with them anymore and that they could have the chemicals he owned. McFarland and Thistlethwaite picked up the chemicals (413). None of these events involved Alphonse Bifulco in any way, nor was he mentioned in the first 413 pages of the trial transcript.

DeMaio then stated that towards the end of November, 1975, he visited Thistlethwaite who said "he met two guys, Mario and Alphonse, and that he would get them chemicals and get them a place to get dust and he was going to do it with them" (414). DeMaio testified that about a week later, he

received a call from Thistlethwaite who stated that he had made some crystals for Mario and Al; that the crystals did not seem to be working; and that he would like DeMaio to check them out. DeMaio said he would and accompanied Thistlethwaite to an apartment somewhere by Alexander's on Queens Boulevard. Upon arriving at the apartment, DeMaio testified that: "I was introduced to Mario and Al - who he identified as defendants Mario and Alphonse Bifulco - and a black guy."

(418) DeMaio examined the crystals and told Thistlethwaite they were not any good. Mario then supposedly said that DeMaio and Thistlethwaite could not leave until they had made some PCP. (425)*. DeMaio also testified that someone told Thistlethwaite and him that if they did not make PCP, they would wind up dead. However, when asked whether he could tell the court who made that statement, DeMaio testified that he was so scared he could not remember (427).

DeMaio testified that in December, 1975 he again visited Thistlethwaite who said that he wanted to pull out of the deal with Mario and Al but they did not want him to leave and had threatened him (444). On another occasion, Thistlethwaite told DeMaio that Mario and Al wanted five pounds of PCP and \$2,000.000 to let Thistlethwaite out. DeMaio said that he then told Thistlethwaite that he would help him make PCP so that Mario could be paid off (447).

*This is the only occasion on which DeMaio met either of the Bifulcos, and his only direct - as distinguished from hearsay - testimony as to any statement made by either one of them.

Soon thereafter, DeMaio went to McFarland's apartment where he and Thistlethwaite mixed three pounds of crystals for which he was paid \$100 and given an ounce of PCP.

Roseanne Polimeni, who also had an extensive history of drug addiction, abuse, and dealing (selling) (822,824,825,1012), was the principal Government witness. She had been named as a defendant in the indictment but had decided to help herself by assisting the Government in the prosecution of this case (1230). Polimeni had pleaded guilty a week prior to commencement of the trial and was awaiting sentence.

Polimeni stated that she had been arrested on a narcotics charge in 1972 and spent approximately two years in a drug rehabilitation center; within a few months of her release, she was selling drugs again (1023).

Polimeni testified that she started dating Alphonse in June, 1975 (826); moved into an apartment with him in August, 1975 (827); and lived with him until October-November, 1975 (831). During the period of June through August, 1975, according to Polimeni, she and Alphonse used and sold PCP and they had had discussions about "where to get it from, who to buy it off" (835). While she and Alphonse sometimes talked about making PCP and about perhaps obtaining the formula from someone (835,839), they did not make PCP (835). She also stated that she did not buy chemicals during August, 1975 and that she did not think Alphonse did either (839).

Their primary sources for PCP were Angelo De Cosimo and Steve Grayson (836) (neither of whom was named in the indictment); Polimeni admitted that De Cosimo and Grayson were her contacts and that she had introduced them to Alphonse (1219). Polimeni characterized her drug dealings with Alphonse during this August, 1975 as a partnership -- "we were together as partners into this and I kept all the books and records of account" (837).*

Significantly, the remainder of Polimeni's testimony makes little mention of any drug-related activity with Alphonse. In fact, on cross-examination, she testified that her drug dealing with Alphonse commenced in June, 1975 and terminated at the time of their arrest by New York City Police on September 2, 1975. This arrest was unrelated to the present case.

She did testify that on or about June 13, 1976 she purchased some chemicals, allegedly on behalf of Alphonse (895). She testified that Alphonse gave her the cash to buy the chemicals and he told her to give the chemicals to him; he, in turn, would give them to Mario who would give them to Michael (912). (This alleged transaction took place long after the events that DeMaio had described.) Polimeni further testified that the chemical company did not have all the desired chemicals in stock so she had to order the remainder.

*The "books and records of account" consisted of two notebooks, one an account book and the other used to record notes, household needs and also some drug dealings. These books had been seized at the time of Polimeni's arrest by New York City Police on September 2, 1975. That arrest was not related to the present indictment.

The prosecution called eleven other witnesses: two New York City Police officers, three chemical company employees, four Drug Enforcement Administration agents, a Drug Enforcement Administration chemist, and an apartment building superintendent. Of these eleven, only two witnesses offered testimony with respect to Alphonse and, at best, such testimony was of little probative use.

Barry Abbott, a Drug Enforcement Administration agent, testified that on the morning of January 7, 1977 he arrested Alphonse Bifulco (1411); that later that morning he explained to Alphonse that he was being arrested because of his involvement with PCP. Abbott then testified that Alphonse said that he did not know what PCP was, that he had never been to Consol Labs (sic) and that he never lived on 108th Street (1413).

The Government's final witness was Carol Vohringer, an employee of Conso-Lab Supply in Westbury, New York. She testified that she was a "Gal Friday" and sales person and had been working there since January, 1976 (1473). She explained the procedures utilized by the company when selling chemicals to individuals. The Government then introduced through the witness a number of receipts for sales of various chemicals. A receipt with the name of Alphonse Bifulco on it, dated November 6, 1975, for the purchase of one five gallon drum of ethyl ether anhydrous at a cost of \$51.36 was introduced. (1482)

The fact that Alphonse had not been connected by any direct evidence to the DeMaio, Thistlethwaite, McFarland

conspiracy dawned on the Assistant United States Attorney near the end of the Government's case. In a colloquy with the Court, the Assistant United States Attorney stated:

"There is no independent evidence in this case that John McFarland knew Alphonse Bifulco". (1463)

He attempted to correct this deficiency by introducing Alphonse's phone book containing a number which was registered to John McFarland. But this number was connected only in October, 1976 (1468), long after all the events described in the testimony.

B. The Trial-Appellant's Case

Alphonse Bifulco was the only defendant to call a witness. He called Marguerita Stratton who testified that she had known both Alphonse Bifulco and Polimeni for approximately 8-9 years; that she was aware of Polimeni's drug dealing and knew that Alphonse Bifulco and Polimeni had lived together. She then testified that Alphonse Bifulco had terminated the relationship primarily because of Polimeni's dealing in drugs and that he did not want to get involved in that (1520). She further testified that Polimeni had told her that she was quite upset over the breakup with Alphonse Bifulco and that she would try to get even with him because it hurt her (1520).

C. The Trial - Charge and Verdict

The relevant parts of the trial court's charge with respect to conspiracy are as follows:

"The evidence in the case must also establish beyond a reasonable doubt that the alleged conspiracy was knowingly formed, as charged in the indictment, and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

The indictment charges that as part of the alleged conspiracy the defendant would manufacture, distribute, and possess with intent to distribute, pencyclidine. In order to find any of the defendants guilty, you must be convinced beyond reasonable doubt as to that particular defendant that he was a member of a conspiracy and that at least one of the three purposes I have just mentioned was a part of that conspiracy." (1666,1667)

* * *

"Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (1669)

Though the trial court instructed the jury that "in determining whether a particular defendant was a member

of the conspiracy, you should consider only his or her acts and statements" (1671), the judge did not marshal the evidence, and made no attempt to separate out for the jury's consideration what evidence applied to which defendant.

Towards the end of the jury's deliberations, the jury sent the court a question (1697). The court called the jury into the courtroom and addressed them as follows:

"First I'll read the question that you have submitted to the Court and the question is: 'When he charges' -- I suppose you are talking about myself -- 'when he charged conspiracy to manufacture, distribution and possession, if we find any individual innocent of any one are we supposed to acquit him of the whole charge.'

That really can't be answered yes or no at this point, so I'll give you an explanation.

The indictment charges that all of these defendants were members of a conspiracy which had three parts: (1) to knowingly and intentionally manufacture phencyclidine; (2) to knowingly and intentionally distribute phencyclidine; (3) to possess phencyclidine with intent to distribute it.

First, you must tell me whether a conspiracy as charged in the indictment existed. If you find that no conspiracy existed as charged then of course you must acquit all the defendants. If you are convinced beyond a reasonable doubt that a conspiracy existed, you must tell me whether the conspiracy encompassed all three of the parts charged in the indictment, only two of the parts, or only one of the parts. Once you have determined that issue you must then determine whether an individual defendant wilfully and knowingly became a member of that conspiracy.

If you find that an individual defendant was involved in only one of the parts as enumerated in the indictment, but that part was not one of the purposes of the conspiracy, then you must acquit that defendant." (1708,1709) (Emphasis supplied.)

Thus, the court requested a special verdict from the jury; however, the jury returned a general verdict. The verdict, as read by the foreman, was:

"We the jury reach an agreement that there was a conspiracy. Jack McFarland, guilty; Michael Thistlewaite (sic), guilty; Mario Bifulco, not guilty; Alphonse Bifulco, guilty." (1710)

ARGUMENT

I.

THE CONVICTION OF APPELLANT ALPHONSE BIFULCO SHOULD BE REVERSED BECAUSE THE PROOF ADDUCED AT TRIAL ESTABLISHED MULTIPLE CONSPIRACIES AND NOT THE SINGLE CONSPIRACY ALLEGED IN THE INDICTMENT.

The existence of a single conspiracy must be established by the evidence adduced at trial. Neither its creation nor its scope are determined by the allegations contained in an indictment. Marino v. United States, 91 F. 2d 691 (9th Cir. 1937).

The indictment charged the defendants and co-conspirators with knowingly and intentionally entering into a conspiracy to: (1) manufacture substantial quantities of PCP, a Schedule III controlled substance; (2) to distribute PCP; and (3) to possess PCP with intent to distribute it. While the court specifically instructed the jury to describe what was the purpose of the conspiracy if it found a

conspiracy*, no such finding of purpose was made. Thus, we are at a loss to know what the conspiracy or what the agreement was which the jury found to exist.

Appellant contends that the evidence elicited at trial cannot support the Government's charge that there existed a single overall conspiracy of which he was a member. If the Government has in fact proven multiple conspiracies, as to some of which appellant was not a common member, there would be insufficient evidence to sustain the conviction. See United States v. Borelli, 336 F. 2d 376 (2d Cir. 1964). In the instant case, an examination of the evidence adduced at trial establishes that the "jury could not possibly have found, upon the evidence, that there was only one conspiracy." Kotteakos v. United States, 328 U.S. 750, 768 (1946). Furthermore, we submit that here, as in Kotteakos, "the dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." Id. at 774. Moreover, despite the possibility of confusion and prejudice inherent in a situation like this, the judge did not marshall the evidence or attempt to sort out what evidence related to the separate conspiracies. Compare United States v. Sperling, 506 F. 2d 1323, 1341 (2d Cir. 1974).

* "If you are convinced beyond a reasonable doubt that a conspiracy existed, you must tell me whether the conspiracy encompassed all three of the parts charged in the indictment, only two of the parts, or only one of the parts." (Tr.1708)

The essence of the evidence adduced by the Government was the testimony of the co-conspirators Larry DeMaio and Roseanne Polimeni:

DeMaio testified to an agreement among himself, Thistlethwaite and McFarland to manufacture and distribute PCP, entered into in August, 1975 and continuing until sometime in October, 1975 when DeMaio asked to pull out.

(391-413) Throughout DeMaio's testimony dealing with this agreement, there was no mention of defendant Alphonse Bifulco. This testimony, if believed, may have linked McFarland and Thistlethwaite to one of the alleged purposes of the conspiracy, but in no way implicated Alphonse Bifulco.

DeMaio further testified that near the end of November, 1975, after he had pulled out of his arrangements with McFarland and Thistlethwaite, he visited Thistlethwaite who told him that "he met two guys, Mario and Alphonse," and that "he was going to do it with them." The court specifically instructed the jury that this conversation was not binding on Alphonse Bifulco. (Tr.414) Thus, there was before the jury a possible second conspiracy - a conspiracy, unlike the first, based entirely on hearsay - comprised of Thistlethwaite, Mario and Alphonse.

Proof of the possible other, separate conspiracies was put before the jury through the testimony of co-conspirator Polimeni. She testified that she and Alphonse Bifulco used and sold PCP from June, 1975 up until their arrest for an

unrelated act on September 2, 1976. She further testified that while they discussed the possibility of making PCP they did not do so; nor would her testimony support a finding of any agreement to do so. In fact, there was no evidence that they purchased any chemicals during this period. She testified explicitly that she did not have any more drug dealings with Alphonse Bifulco after their September 2, 1975 arrest. There is no connection, in time, purpose, or participants, between this enterprise and those described by DeMaio.

Polimeni testified that in or about October, 1975, she broke up with Alphonse Bifulco and that toward the middle of December, 1975 she moved into Thistlethwaite's apartment. She testified that while living with Thistlethwaite, she embarked upon drug dealings with him. Thus, another illicit arrangement between Thistlethwaite and Polimeni, to which Alphonse was not connected, was before the jury.

What the above facts demonstrated in this case - even when viewed in the light most favorable to the Government, United States v. McCarthy, 473 F. 2d 300, 302 (2d Cir. 1972) - is a series of unrelated criminal acts, all of which involved some form of illicit drug activity.

The relationships and functions of the parties to the various illicit drug activities are not such as to establish an "integrated loose-knit combination" which creates the

lawful inference of a single conspiracy, United States v. Bynum, 485 F. 2d 490, 495 (2d Cir. 1973), vacated and remanded on other grounds, 417 903 (1974). Nor is this the type of operation that leads to the inference that separate transactions between several of the alleged conspirators can be viewed as part of a single conspiracy because they represent two or more spokes connected to a single hub. See United States v. Mallah, 503 F. 2d 971, 976 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975).

In United States v. Bertolotti, 529 F. 2d 149, 154 (2d Cir. 1975), this Court enumerated various considerations which support a finding of a single conspiracy:

"Despite the existence of multiple groups within an alleged conspiracy, we have considered them as part of one integrated loose-knit combination in instances where there existed 'mutual dependence and assistance' among the spheres, a common aim or purpose among the participants or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture. The common thread running through these cases is our treatment of them as general, albeit illegal, business ventures." United States v. Bertolotti, supra, at 154-155. (Citations omitted.)

For example, some of the factors which this Court has considered in determining whether there is a "general, albeit illegal, business venture" include "common direction from the core-conspirators, commingling of assets, mutual dependence, and

common business offices...." United States v. Mallah, supra, at 976.

The evidence produced in this case establishes no organization at all, not even a "loose-knit" one. No analogy to a business can link together McFarland and the Bifulcos, or the Bifulcos and DeMaio. There was little or no evidence to suggest that these defendants even knew each other, much less "were conducting what could seriously be called 'a regular business on a steady basis'". United States v. Miley, 513 F. 2d 1191, at 1207 (2d Cir. 1975).

An examination of the evidence reveals that there was no dependence or other relationship between any of the four conspiracies discussed at trial. Since the indictment charges one conspiracy and the proofs demonstrated a series of small ones, there has been a material variance. However, it is recognized that a variance between the offense charged in the indictment and the proof adduced at trial does not automatically mandate reversal; "the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights." United States v. Agueci, 310 F. 2d 817, 827 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963).

It is submitted that the "spill-over" effect from the testimony in a trial lasting almost three weeks substantially prejudiced Alphonse's right to have the jury give

each defendant the individual consideration that our legal system requires. The constant reference throughout the trial to the illicit drug activities with respect to the various defendants - including hearsay declarations such as DeMaio's testimony as to what Thistlethwaite told him (414, 416, 444) - would make it difficult for the jurors to individualize and compartmentalize the evidence with respect to each defendant.

Here, unlike United States v. Sperling, supra, at 1341, there was no effort by the trial judge to marshall the evidence, nor focus the jury's attention on the evidence which related to one individual, rather than another. Moreover, while the court at one point directed the jury to specify what they found the conspiracy to be (Tr. 1708), that direction was ignored when the verdict was returned. (Tr. 1710). If, however, the jury had determined that the conspiracy had included an agreement to manufacture PCP, it would have been impossible on the evidence to find that Alphonse Bifulco was part of such a conspiracy.

II.

THE EVIDENCE WAS INSUFFICIENT TO
SUPPORT A FINDING BEYOND A
REASONABLE DOUBT THAT APPELLANT
KNOWINGLY AND WILLFULLY PARTICIPATED
IN A CONSPIRACY TO MANUFACTURE PCP

Appellant contends that the evidence adduced at trial, considered in the light most favorable to the Government,

is insufficient to sustain a finding of guilt beyond a reasonable doubt of the charge of agreeing to manufacture PCP, the charge on which he was convicted. United States v. Taylor, 464 F. 2d 240 (2d Cir. 1972).

The United States Supreme Court has stated that:

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364 (1970).

The Government's case consisted of thirteen testimonial witnesses, two of whom were, by their own admission, participants in the illegal activities. Both co-conspirator witnesses admitted they were cooperating with the Government to help their own respective positions. It was through the testimony of these two co-conspirator witnesses, particularly Roseanne Polimeni, that appellant, Alphonse Bifulco, was connected with the alleged conspiracy. It is apparent that the substantial number of co-conspirators' declarations - hearsay and otherwise - relating to several possible conspiracies had a substantial impact on the jury's deliberations.

The almost exclusive reliance by the Government upon the testimony of accomplices who have either pleaded guilty and are awaiting sentencing or are threatened with criminal responsibility for their own acts should not be

sufficeint to carry the Government's burden of proof beyond a reasonable doubt. As long ago as 1917, the U.S. Supreme Court stated that the

"...better practice [is] for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence." Caminetti v. United States, 242 U.S. 470, 495 (1917).

Although hearsay utterances of a conspirator made in the course of an in furtherance of the conspiracy are admissible against co-conspirators, the trial judge must be assured that the "prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." (Citations omitted.) United States v. Miley, supra, at 1208 (emphasis supplied). It is also established that the necessary independent proof must be substantial and not "too slight." United States v. Consolidated Laundries Corp., 291 F. 2d 563 (2d Cir. 1961); United States v. Bentivena, 319 F. 2d 916 (2d Cir. 1963).

An examination of the independent proof of Alphonse's complicity in the alleged conspiracy adduced at trial, establishes that the Government's case was not substantial enough to support the introduction of co-conspirators' declarations regarding Alphonse's participating in any manufacturing scheme.

In United States v. Miley, supra, this Court discussed this point at footnote 12, reiterating the standard that, before hearsay utterances are permitted, the prosecution must have proved participation in the conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances." The court there went on to describe five specific items which supported the conclusion there,

Here, independent evidence of Alphonse Bifulco's participation in a conspiracy to manufacture PCP was limited to a receipt from Conso-Lab Supply of Westbury, New York, dated November 6, 1975, for the purchase by Alphonse of one five-gallon drum of ethyl ether anhydrous at a cost of \$51.36.⁽¹⁴⁸²⁾ It is submitted that such a purchase - legal in itself - cannot be the foundation for the introduction of the hearsay declarations of DeMaio that Alphonse and Mario were involved with Thistlethwaite.* See United States v. Falcone, 311 U.S. 199 (1940), where the Court held that even where one sells materials knowing they will be used in the production of illicit substances, but does not know of a conspiracy he cannot be charged as a co-conspirator.

The mere presence of the Bifulcos and Thistlethwaite at one meeting at the end of November, 1975, had no probative effect. DeMaio testified that at the end of November, 1975, at the request of Thistlethwaite, he accompanied Thistlethwaite to an apartment to examine some crystals allegedly made by

*Mario Bifulco was acquitted by the jury.

Thistlethwaite. DeMaio stated that, upon arriving, he was introduced to Mario, Alphonse and "a black guy" and though there was conversation among the various parties present, DeMaio could not remember which of the brothers did the talking; he believed it was Mario. (424,427)

It is well established that association with conspirators, even coupled with the knowledge of the objectives of the conspiracy, is not sufficient to find complicity.

United States v. Stromberg, 268 F. 2d 256 (2d Cir. 1959):

"Mere association with conspirators is insufficient basis for finding of participation."

In that case, the uncertainty of the Customs Officer's conduct at meetings with co-conspirators led the court to conclude:

"The independent evidence was too slight to warrant the admission of hearsay declaration and too slight to submit to the jury." 268 F. 2d at p. 267.

Here there was not sufficient evidence to find appellant guilty of a conspiracy to manufacture PCP.

III.

Appellant Joins in Each of the Points of Law Raised By the Other Appellants, When Applicable to Him and Not Inconsistent With Any Contentions Asserted Here.

CONCLUSION

The judgment of conviction below should be reversed.
The indictment should be dismissed or, in the alternative,
appellant should be granted a new trial.

Dated: New York, New York
November 2, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff

against

ALPHONSE BIFULCO,

Defendant

Affidavit of Service on Person in Charge

State of New York

County of New York

} ss.:

Michal Bobryk

being duly sworn, says that he is above the age of 21 years; that on the
2nd day of November 1977 between the hours of 4 P. M. and 5 P. M.,
he served the annexed brief

on David C. Trager the Attorney for the plaintiff
in the above entitled action, at his office, No. 225 Cadman Plaza East
in the City of New York by delivering a true copy of the
same to and leaving the same with person in charge of said office, ~~said attorney being absent~~
~~therefrom at the time of said service.~~

Sworn to before me, this 2nd day
of November 1977

Robert A. Perkins

ROBERT A. PERKINS
Notary Public, State of New York
No. 41-8327500 - Queens County
Certificate filed in New York County
Commission Expires March 30, 1978

Michal Bobryk